IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 27TH FEBRUARY 2007 / 8TH PHALGUNA 1928

Crl.MC.No. 53 of 2007()

CMP.7869/2006 of JUDL.MAGISTRATE OF FIRST CLASS-III, KOTTAYAM

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PETITIONER;/RESPONDENT:

P.CHAMDRASEKHARA PILLAI,
S/O. PARAMESWARA PILLAI, CHANDRBHAVANAM HOUSE,
VENDAR, KULAKKADA, KOTTARAKKARA,
(WORKING AT P.O. BOX 50891, DUBAI, U.A.E.)

BY ADV. SRI.K.RAMAKUMAR

RESPONDENTS: COMPLAINANT/STATE

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1. VALSALA CHANDRAN,
W/O. P.CHANDRASEKHARA PILLAI,
SREERAGAM, MARYATHURUTHU P.O.
KOTTAYAM.

2. STATE OF KERALA REP. BY THE
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R2 BY PUBLIC PROSECUTOR SRI. S.U. NAZAR
R1 BY ADV. SRI.K.GOPALAKRISHNA KURUP
SRI.S.MANU
SRI.R.ANILKUMAR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 27/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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Crl.M.C.No. 53 of 2007

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Dated this the 27th day of February, 2007

O R D E R

The petitioner in this Crl.M.C. has suffered an ex parte interim order under Section 23 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as `the Act'). That order was suffered by the petitioner in an application filed by the first respondent herein, admittedly his wife. She had approached the learned Magistrate with an application under Section 19 of the Act. The learned Magistrate, after considering the affidavit filed by the petitioner along with the application under Section 12, where she claimed relief under Section 19, came to the conclusion that ex parte interim order is liable to be passed in favour of the first respondent herein. Accordingly, an order was passed invoking the powers under Section 23 r/w. Section 19 allowing the first respondent and her children to reside in the house "Chandra Bhavanam, Kuruppu's Lane, Sasthamangalam, Thiruvananthapuram. The City Police Commissioner, Trivandrum was further directed to give necessary

protection to the first respondent for her peaceful residence in the home along with her children.

2. I shall hereafter refer to the parties in the manner in which they are ranked before the learned Magistrate. As stated earlier, marital tie is admitted. The petitioner and the respondent are an estranged couple admittedly. The respondent/husband assails the impugned interim ex parte order passed under Section 23 of the Act and prays that the powers under Section 482 Cr.P.C. may be invoked to quash the order. Various grounds are urged in support of the prayer. I shall proceed to consider them later. The learned counsel for the petitioner on the other hand contends that an appeal under Section 29 is maintainable and therefore the respondent, who has not chosen to invoke the right of appeal under Section 29 of the Act, cannot be permitted to request this Court to invoke the powers under Section 482 Cr.P.C.

3. The learned counsel Shri.Ramkumar, appearing for the respondent/husband fairly concedes that an appeal is maintainable under Section 29 of the Act against an interim ex parte order passed under Section 23 r/w. Section 19 of the Act. On that aspect no dispute is raised in this petition. In another petition (Crl.M.C. 264 of 2007) which was also being heard along with this petition, a contention was raised that no such

appeal is at all maintainable under Section 29 of the Act against an interim order under Section 23 r/w. Section 19 of the Act. I have already held today as per the decision in the Crl.M.C. referred earlier that such an appeal is maintainable. At any rate, since the learned counsel for the petitioner concedes the same, it is not necessary to advert to that controversy in this order.

4. The learned counsel for the respondent contends that though an appeal is maintainable under Section 29 of the Act, this is a fit case where notwithstanding the availability of that remedy this petition under Section 482 Cr.P.C. can and ought to be entertained considering the peculiar nature and circumstances of the case. The counsel contends that the sweep of the powers under Section 482 Cr.P.C. is so wide that the mere availability of an alternative relief cannot and does not fetter the powers of this Court under Section 482 Cr.P.C. if the court is satisfied that in the interests of justice the invocation of such power is necessary and warranted.

5. Normally the availability of an efficacious alternative remedy will certainly prompt this court to look for an explanation as to why such available provisions are not being made use of and only if the court is satisfied that there are compelling reasons of an exceptional variety will

this court choose to invoke the powers under Section 482 Cr.P.C. even when such alternative remedies are not invoked by a petitioner.

6. The learned counsel for the respondent contends first of all that an appeal under Section 29 of the Act, (I extract the statutory provision below) will be available only after notice of the order is served on the respondent.

> **S.29. Appeal**.- There shall lie an appeal to the Court of Sessions within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later."

7. The crux of the contention of the petitioner is that in this case the ex parte interim order under Section 23 has not been served on the respondent. Consequently, he cannot claim a right of appeal under Section 29 of the Act. I am unable to accept this contention at all. The service of the order on the respondent has nothing to do with the right of appeal under Section 29 of the Act. The right of appeal is available to an aggrieved person or the respondent, but such right of appeal has to be exercised within the period of one month stipulated under Section 29 and such period of 30 days would start running from the date of service of the order on the respondent or the aggrieved person. I find it absolutely unacceptable to assume that the right of appeal would depend on the service of the order on the respondent.

8. The learned counsel for the petitioner submits that in fact the order has been served. The counsel for the respondent disputes the same. I am, in these circumstances, not embarking on that controversy at all. I unhesitatingly come to the conclusion that the right of appeal is not dependent on the service of the impugned order on the respondent. That contention cannot obviously be accepted. The respondent has himself produced the impugned order, which he has obtained from the learned Magistrate after making due application. Even assuming that the order under Section 23 has not been served on the respondent in the manner contemplated under Section 24, without dispute and concededly Annex.B, copy of the impugned order, has been received by the respondent. He cannot be heard to contend that he has no right of appeal because the order has not been served on him.

9. The learned counsel for the respondent then contends that it is an illusory right of appeal. He relies on the provisions of Section 12(4) of the Act. He contends that the first date of hearing must be within three days of the date of receipt of the application by the court and the ex parte interim order passed by the Magistrate cannot be challenged in appeal within the said period of three days. I find no merit in this contention at all. Provisions of Section 12(4) can have no bearing while considering the

existence or not of the right of appeal. The interim ex parte order may have a life longer than three days, which is referred to in Section 12(4). Section 12(4) uses the expresson "ordinarily" and that itself shows that the provision has elasticity to cater to the needs of the facts of a particular case. In these circumstances, to say that the right of appeal will have to be exercised in respect of an order under Section 23 within three days and therefore it is not an effective remedy, cannot obviously be accepted.

10. The learned counsel for the respondent contends that in this case the petitioner has not filed any separate application under Section 23 for grant of an interim order. Therefore the impugned order passed is legally unsustainable he urges. I extract Section 23 below:

> "**S.23. Power to grant interim and ex parte orders**. - (1) In any proceeding before him under this Act, the Magistrate may pass such interim order as he deems just and proper.
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> (2) If the Magistrate is satisfied that an application prima facie discloses that the respondent is committing, or has committed an act of domestic violence or that there is a likelihood that the respondent may commit an act of domestic violence, he may grant an ex parte order on the basis of the affidavit in such form, as may be prescribed, of the aggrieved person under section 18, section 19, section 20, section 21 or, as the case may be, section 22 against the respondent."

11. I am unable to understand the provisions of Section 23 as compulsorily insisting on any separate application for interim order under Section 23. An application referred to in Section 23(2) is obviously an application under Section 12 claiming relief under Sections 18 to 22. It is impossible to understand the expression "an application" in Section 23(2) as importing a requirement that a separate application must be filed to claim the relief of an interim order under Section 23. Doubts, if any, on this aspect pale into insignificance when we consider that Section 23 only insists on an affidavit in such form as may be prescribed to justify the claim for an interim order and ad interim order under Section 23. Rules prescribe the form of affidavit also. From the plain language employed by the statute in Section 23, it is impossible to spell out an insistence that a separate application under Section 23 must be filed in order to clothe the court with the requisite jurisdictional competence and the claimant with a right to claim the relief of an interim order under Section 23. I do not agree with such interpretation, which is sought to be placed on the provisions of Section 23(2) by the learned counsel for the petitioner.

12. The learned counsel for the petitioner then contends that any interim order has to be passed only "on the basis of the affidavit of the

aggrieved person". In the affidavit reasons must be shown as to why an interim order under section 23 must be passed. The counsel contends that a reading of the affidavit, which has been produced as Ext.R1(a), can only show that the relief claimed in that affidavit is only the relief under Section 18 and not the relief of an interim order under section 23. The learned counsel for the petitioner submits that this contention is factually and legally incorrect. Paragraph 11 of Ext.R1(a) is referred to by the learned counsel for the petitioner to contend that separate prayer is made for an interim order under Section 23 also. More over, a reading of Ext.R1(a) affidavit must convey to the court that such affidavit is filed to satisfy the requirement of Section 23 as no such affidavit is necessary or insisted for an application under Section 18 simplicitor. The very purpose of filing the affidavit was to seek an order under Section 23. This contention raised that a separate application has not been filed under Section 23(2) and the affidavit filed is not sufficient to justify the grant of an interim order under Section 23(2) cannot, in these circumstances, succeed.

13. The learned counsel for the respondent then contends that there has been gross non-application of mind by the learned Magistrate while granting the interim order, produced as Annex.B. This argument is built on the premise that relief is granted to the petitioner and her children, whereas

there is no contention that the children need a home or are without a home. They are actually residing with the respondent herein, it is contended. I do note that though there is no specific prayer in ext.R1(a) for any residence so far as the children are concerned, such an interim order is granted by the learned Magistrate. But the crucial question is about the grant of interim order in favour of the petitioner/wife and in these circumstances the mere fact that relief has been granted in respect of the children also, though unsatisfactory, is not, according to me, sufficient to justify the invocation of the jurisdiction under Section 482 Cr.P.C.

14. The other contentions raised by the respondent are on merits of the dispute. Counsel contends that no domestic violence as defined under Section 3 of the Act has been proved. He further contends that there is no shared household as specified in the expression in Section 2(s). These are, according to me, contentions, which can be urged by the petitioner after appearing before the learned Magistrate in his prayer for vacation or non-extension of the interim order. They can be subject matter of appeal under Section 29 also in an appropriate case. At any rate, I am not persuaded that powers under Section 482 Cr.P.C. can or deserve to be invoked on these grounds in the facts and circumstances of this case.

15. I am, in these circumstances, of the opinion that there are no circumstances justifying the invocation of the powers under Section 482 Cr.P.C. against the impugned order at the instance of the petitioner, who has not invoked his right of appeal under Section 29 nor invoked his right to appear before the learned Magistrate and pray for vacation/alteration/ modification of the interim order already passed. I need only mention that it shall be open to the petitioner to raise appropriate contentions before the learned Magistrate and the learned Magistrate imbibing the sense of expedition, which is expected of him, under Sections 12(4) and 12(5) of the Act must proceed to dispose of the petition on merits, expeditiously and in accordance with law.

16. With the above observations, this Crl.M.C. is dismissed.

(R. BASANT)
Judge

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